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December 5, 1994

Mr. Steve McLellan, Secretary
Washington Utilities and
Transportation Commission
1300 South Evergreen Park Drive SW
PO Box 47250
Olympia, WA 98504-7250

Re: The Disposal Group, Inc. v. Waste Management Disposal Services of Oregon, Inc.
Docket No. TG-941154

Dear Mr. McLellan:

Enclosed please find the original and 19 copies of the ***Reply Brief of Commission Staff*** in the above-referenced matter. Please accept the same for filing.

Very truly yours,

Steven W. Smith
Assistant Attorney General

dc

Enclosures

cc\enc: Parties of Record

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

THE DISPOSAL GROUP, INC., dba Vancouver Sanitary Service and Twin City Sanitary Corporation (G-65); Complainant, v. WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., dba Oregon Waste Systems, a Delaware Corporation, Respondents.	DOCKET NO. TG-941154 REPLY BRIEF OF COMMISSION STAFF

The Commission Staff Replies to the opening Briefs of the other parties in the manner set forth below.

I. Reply to Briefs of the Disposal Group and Washington Refuse and Recycling Association.

As explained in our opening Brief, Staff's position is that the Commission lacks jurisdiction over the economic regulation of T&G's transportation of sludge from Washington directly to Oregon. Thus, on the ultimate issue Staff's position differs from that of T&G and intervenor Washington Refuse and Recycling Association. The basis for Staff's position and, in effect, Staff's reply to the Briefs

of those two parties, is set forth in detail in our opening Brief and will not be repeated here.

The only additional reply we make here is to TDG's and intervenor's focus on the definition of solid waste under state law. Even assuming the sludge in this case were solid waste under state law, that would not end the analysis. The equally critical inquiry is how the commodity is characterized for purpose of federal law. Likewise, the Oregon State Department of Environmental Quality's characterization of the sludge for another purpose does not resolve the issue for purposes of the federal law with which we are concerned.

II. Reply to Brief of Respondent T&G

In its initial Brief, T&G contends that it is not in any sense involved in the "collection" of sludge at the ALCOA site. Initial Brief of T&G at pp. 10 and 12. No finding on T&G's collection activity is necessary to a decision in this matter, and such a finding could be problematic in future cases where hair splitting distinctions over whether collection was involved could be argued in an attempt to frustrate the statutory scheme of chapter 81.77 RCW.

On page 8 of its initial Brief, T&G makes reference to the Commission decision in In re Arrow Sanitary Services, Inc., a/b/a Oregon Paper Fiber, Cause No. TG-2197. While it is accurate that the Commission ruled that a carrier providing waste collection service to a single customer was a contract carrier subject to Chapter 81.77 RCW, there was no commerce clause issue raised in that

proceeding. Consequently, the Arrow Sanitary case is not a precedent for the commerce cause issues raised in this complaint.

III. Reply to Brief of Respondent OWS

Beginning at page 25 of its opening Brief, OWS argues that the ICC decision in Joray Trucking Corp. Common Carrier Application, 99 MCC 109 (1965) does not govern this case because Joray was decided under subchapter II (49 U.S.C. § 10521-31) of the Interstate Commerce Act, while the intermodal rail and truck transportation involved in this case is exempt under subchapter I (49 U.S.C. § 10501-05) of that act. OWS claims that subchapter I grants jurisdiction to the ICC over all transportation, not just transportation of passengers or property and, therefore, that the preemption for intermodal movements in 49 U.S.C. § 10505(f) applies to waste as well as property.

It is true that the section granting general jurisdiction in subchapter I differs from the comparable section in subchapter II. Compare 49 U.S.C. § 10501 and § 10521. Although the introductory language of 49 U.S.C. § 10501 does speak generally about "transportation," at one point the statute does refer to "the transportation of passengers or property." 49 U.S.C. § 10501(b)(1). It was on that basis that the Seventh Circuit Court of Appeals stated the following:

> The Commission's jurisdiction under the Act is confined to "transportation." 49 U.S.C. § 10501. "Transportation" as defined in 49 U.S.C. § 10501 refers only to the movement of passengers or property or such directly related services as the receipt and storage of goods.

Bloomer Shippers Association v. Illinois Central Gulf Railroad Company, 655 F.2d 772, 778, n. 4 (7th Circ. 1981).

Thus, it is far from clear that OWS' claim of ICC jurisdiction under subchapter I extends to waste. Under Bloomer Shippers the jurisdiction of the ICC, insofar as waste is concerned is the same under subchapter I as subchapter II. In any event, the sludge in this case has value and is therefore property, so that it is unnecessary for the Commission to base its decision on the claimed ICC jurisdiction over waste.

Although Staff raised concerns about the constitutional application of chapter 81.77 RCW to T&G's hauling of sludge, they are not the same constitutional concerns raised by OWS. Brief of OWS at pp. 32-34. Moreover, Staff does not agree with OWS' claim that C&A Carbone v. Town of Clarkstown, New York applies to this case. 62 U.S.L.W. 4315, 28 L. Ed. 2d 399 (1994).

In Staff's opening Brief we expressed concern about whether chapter 81.77 RCW as applied to T&G would meet the Pike v. Bruce Church balancing test. Staff disagrees with OWS' claim, however, that chapter 81.77 RCW is "protectionist legislation" that is "per se invalid" as applied to T&G.

When a statute (1) directly regulates or discriminates against interstate commerce, or (2) when its effect is to favor in-state economic interests over out-of-state interests, a "virtual per se" rule of invalidity has applied on the ground that such regulation amounts to "simple economic protectionism." City of Philadelphia, 437 U.S. 617, 623-624, 57 L. Ed. 2d 475, 98 S. Ct. 2571 (1978).

Chapter 81.77 RCW does not directly regulate interstate commerce. The act directly regulates solid waste collection in the state of Washington. RCW 81.77.100. By its terms, chapter 81.77 RCW may not be used to regulate interstate commerce which the state is constitutionally prohibited from regulating. See RCW 81.77.100. Chapter 81.77 RCW is neutral on its face and prohibits solid waste collection by uncertificated companies whether they dispose in Washington or out-of-state. Anyone, without regard to citizenship or state of incorporation, may apply for and be granted a certificate. The purpose of the act cannot possibly be to discriminate against out-of-state carriers since certificates have been granted to out-of-state companies often at the expense of Washington companies who may wish to serve those same territories.

As far as out-of-state disposal sites are concerned, there is nothing whatsoever in chapter 81.77 RCW that prevents the free flow of waste across state borders. Out-of-state disposal sites can compete for disposal business if they are interested in acquiring it. Nothing in chapter 81.77 RCW hoards disposal service for in-state economic interests. The fact that the burden of a state regulation falls on some interstate companies does not establish a claim of discrimination against interstate commerce. Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 57 L. Ed. 2d 91, 98 S. Ct. 2207 (1978). The Commerce Clause protects only interstate markets, not particular interstate firms from prohibitive or burdensome regulation. Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 474, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981).

A critical distinction between the C & A Carbone case and this case is that transportation was not involved in Carbone. The Supreme Court in Carbone analyzed the service as a waste processing service unrelated to any transportation function. T&G's operations involve the transportation of waste. This distinction between the two types of cases can be critical, because the constitutional analysis for processing cases is not the same as the analysis for transportation cases. Even ignoring the distinction between the analyses for transportation cases and processing cases in Commerce Clause jurisprudence, Carbone does not support any claim that chapter 81.77 RCW is per se invalid.

In Carbone, the Supreme Court found that the town of Clarkstown's flow control ordinance regulated interstate commerce in two ways. First, the Carbone processing facility received and processed waste from outside the town, including waste coming from out of state. Under the flow control ordinance, Carbone was required to send the nonrecyclable portion of this out of state waste to the town's transfer station. This requirement drove up the cost for out-of-state interests to dispose of their solid waste. 62 U.S.L.W. 4317.

Second, insofar as the ordinance applied to waste originating in Clarkstown, the ordinance prevented everyone except the single local operator from performing the initial processing step. Consequently, the Court found that the ordinance deprived out of state businesses of access to a local market.

The two reasons the Court found the town's ordinance to regulate interstate commerce are not present in the Washington statutory framework for solid waste

collection. Chapter 81.77 RCW does not drive up the costs for out-of-state interests, to dispose of solid waste or otherwise. No waste originating outside of the state of Washington is affected by the Washington statute.

The Supreme Court's focus on out-of-state businesses being denied access to local markets has no application because the Washington statute does not deny out-of-state businesses access to the local market. While an out-of-state company cannot operate to collect waste without a certificate to do so, the same requirement applies to in state businesses. The Washington statute does regulate market entry, but it does so in a manner that does not discriminate against out of state interests. The Washington statute does not require that the collection service be performed by a local provider. Out-of-state businesses do provide collection services in the State of Washington.

In the case of the processing and disposal service that was at issue in Carbone, the Washington statute does not impose any local processing requirement. Out-of-state disposal sites are not deprived of access to in state markets. Out-of-state disposal services are allowed to compete to provide those services for waste collected in Washington.

After the Supreme Court found that the flow control ordinance regulated interstate commerce, the Court went on to find that regulation to unconstitutionally discriminate against interstate commerce. There were two reasons for this conclusion. First, the Court referred to its earlier discussion of the reasons the ordinance affects interstate commerce as being the same reasons the

ordinance discriminates against interstate commerce. 62 U.S.L.W. 4317. As noted above, these aspects of the Clarkstown ordinance are absent from the Washington statute.

Second, the Supreme Court noted that what makes waste a profitable business is that its possessor has to pay to get rid of it.[1] From this fact, the Court concluded that the article of commerce is more the service of processing and disposing of waste than the solid waste itself. When the Court focused on the processing and disposal service as the commerce, the Court concluded that the flow control ordinance discriminated against out-of-state interests because it allowed only the favored local operator to process waste within the town limits:

> "In this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid. [Citations omitted.] . . . The essential vice of laws of this sort is that they bar the import of the processing service. . . . Out-of-state [processors] . . . are deprived of access to local demand for their services."

Carbone at 62 U.S.L.W. 4317.

Nothing in the Washington statute bars the importation of a processing service. Out-of-state collectors can and do operate in Washington. Waste collected in Washington is free (at least under chapter 81.77 RCW) to flow across state lines. While there may be constitutional issues in this case that do not involve the virtual per se rule of invalidity under the Commerce Clause. Moreover,

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[1] The ordinance also generated revenue for the town since it was a financing measure. Revenue generation for the state is not a feature of the Washington statute. 62 U.S.L.W. 4318.

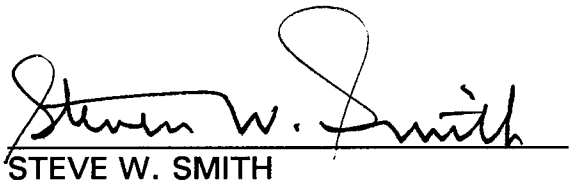
as noted in Staff's opening Brief, since this case can be decided completely on statutory grounds it is not necessary for the Commission to reach the constitutional issues.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in Staff's opening Brief, the Staff requests the complainant's prayer for relief be denied.

DATED this 5th day of December, 1994

CHRISTINE O. GREGOIRE
Attorney General



STEVE W. SMITH
Assistant Attorney General

CERTIFICATE

I, Steven W. Smith, do hereby certify that I did cause to be served upon all parties of record below listed, a true and correct copy of the foregoing Reply Brief of Commission via Facsimile Transmission, State Inter-Office Campus delivery, or by U.S. Mail, postage prepaid and addressed to the following at the addresses listed for each party:

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DATED this 5th day of December, 1994.

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